

ESTTA Tracking number: **ESTTA598505**

Filing date: **04/14/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Big Y Foods, Inc.
Granted to Date of previous extension	04/13/2014
Address	2145 Roosevelt Avenue Springfield, MA 01104 UNITED STATES

Attorney information	Mark D. Giarratana, Esq. McCarter & English, LLP 185 Asylum Street CityPlace I Hartford, CT 06103 UNITED STATES mgarratana@mccarter.com, dewen@mccarter.com, gpajer@mccarter.com, hartforddocketing@mccarter.com
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Applicant Information

Application No	85911834	Publication date	10/15/2013
Opposition Filing Date	04/14/2014	Opposition Period Ends	04/13/2014
Applicant	Australis Aquaculture, LLC One Australia Way Turner Falls, MA 01376 MOROCCO		

Goods/Services Affected by Opposition

Class 029. First Use: 0 First Use In Commerce: 0 All goods and services in the class are opposed, namely: Seafood, namely, fish, not live
Class 031. First Use: 0 First Use In Commerce: 0 All goods and services in the class are opposed, namely: Live seafood, namely, fish, for food purposes

Grounds for Opposition

The mark is merely descriptive	Trademark Act section 2(e)(1)
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Attachments	Notice of Opposition - BETTER TASTING (04.14.2014) [FINAL].PDF(18046 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/mdg/
Name	Mark D. Giarratana, Esq.
Date	04/14/2014

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Big Y Foods, Inc.,)	Application No. 85/911,834
)	
Opposer,)	Mark: BETTER TASTING,
)	BETTER FOR YOU,
)	BETTER FOR OUR
)	ENVIRONMENT
v.)	
)	Opposition No. _____
)	
Australis Aquaculture, LLC,)	
)	
Applicant.)	

NOTICE OF OPPOSITION

Big Y Foods, Inc. (“Big Y”), a Massachusetts corporation, having a principal place of business at 2145 Roosevelt Avenue, Springfield, Massachusetts 01104 (hereinafter referred to as “Opposer”), believes it will be damaged by the registration of the trademark that is the subject of U.S. Trademark Application No. 85/911,834 (the “Application”) and hereby opposes registration of same under Section 13 of the Trademark Act, 15 U.S.C. § 1063.

In support of this opposition, Opposer, by its attorneys, states as follows:

1. Applicant Australis Aquaculture (hereinafter, “Applicant”) filed the Application on April 23, 2013, based on an intent to use the mark BETTER TASTING, BETTER FOR YOU, BETTER FOR OUR ENVIRONMENT (“Applicant’s Mark”).
2. The goods for which Applicant seeks registration of the Application are “seafood, namely, fish, not live” in International Class 29; and “live seafood, namely, fish, for food purposes” in International Class 31 (the “Goods”).
3. The Application was published for opposition on October 15, 2013. Opposer obtained a ninety-day extension of time to oppose for good cause, through February 12, 2014; and a sixty-day extension of time to oppose with the consent of Applicant, through Sunday, April 13, 2014.

Accordingly, pursuant to 37 C.F.R. § 2.196, the deadline for filing this Notice of Opposition is Monday, April 14, 2014.

4. Opposer provides retail supermarket, pharmacy, and related services and food products under the house-mark BIG Y®, as well as various other marks identifying particular services and/or products.

5. Applicant objected to Opposer's use of SUSTAINABLE SEAFOOD BETTER FOR YOU, BETTER FOR THE COMMUNITY, BETTER FOR THE ENVIRONMENT, and demanded that Opposer cease further use of such "better" phrases.

6. Applicant's Mark fails to meet the statutory requirements of Section 2 of the Lanham Act, 15 U.S.C. § 1052, and, therefore, should be denied registration.

7. Applicant's Mark is not inherently distinctive.

8. Applicant's Mark is comprised of three phrases which, individually and collectively, merely describe the Goods, in that they are merely informational and/or laud the supposed health, societal, and environmental benefits of the Goods, and particularly, of sustainable foods such as those sold by Applicant.

9. Upon information and belief, each of the three phrases which comprise Applicant's Mark is commonly used in the industry and by consumers to describe the supposed health, societal and environmental benefits of sustainable food and agriculture.

10. Upon information and belief, it is also common among consumers and in the industry to describe the supposed benefits of sustainable food and agriculture by combining one or more of the phrases which comprise Applicant's Mark, with one or more other "better" phrases having similar meanings or connotations, often in groups of three.

11. Upon information and belief, consumers and those in the industry are accustomed to describing, and seeing described, the benefits of sustainable food and agriculture through the use of "better" phrases such as those used by Applicant, and particularly, in groupings of three "better" phrases. Accordingly, consumers and those in the industry will not distinguish between Applicant's Mark and other combinations of "better" phrases.

12. Applicant's Mark does not constitute a valid and protectable trademark because it comprises merely descriptive phrases which, individually and as a whole, lack distinctiveness and are incapable of identifying a single source.

13. Applicant's combination of three merely descriptive "better" phrases to create Applicant's Mark does not create a non-descriptive meaning, or a distinctive commercial impression. Accordingly, Applicant's Mark does not function as a source identifier.

14. Applicant's Mark has not acquired distinctiveness through substantially exclusive and continuous use, as required under 15 U.S.C. § 1052(f), because the "better" phrases comprising Applicant's Mark, and variants thereof, are commonly used throughout the industry and by consumers, such that Applicant's Mark is incapable of identifying a single source.

15. If Applicant were granted the registration herein opposed, Opposer, as well as other sellers of sustainable foods, would be deprived of the use of a commonplace means of describing the benefits of sustainable food and agriculture, thus damaging and causing injury to Opposer.

16. If Applicant were granted the registration herein opposed, it would thereby obtain at least a prima facie exclusive right to the use of Applicant's Mark. Such registration would be a source of damage and injury to Opposer.

WHEREFORE, Opposer respectfully requests that the Board deny registration of Applicant's Mark, as depicted in the Application, under 15 U.S.C. § 1063.

Respectfully submitted,

Date: April 14, 2014

/Mark D. Giarratana/
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Attorneys for Opposer

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that this Notice of Opposition is being filed with the Trademark Trial and Appeal Board, Commissioner for Trademarks, P.O. Box 1451, Alexandria, Virginia, 22313-1451, by using the ESTTA electronic filing system, this 14th day of April, 2014.

/David Ewen/

David Ewen

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Opposition has been served on Applicant's Attorney of record, Giovanna H. Fessenden, Hamilton, Brook, Smith & Reynolds, P.C., P.O. Box 9133, Concord, Massachusetts 01742-9133, via first class mail, postage pre-paid, this 14th day of April, 2014.

/David Ewen/

David Ewen